BEFORE THE PUBLIC UTILITIES COMMISSIONOF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking on the Commission's own motion into the application of the California Environmental Quality Act to applications of jurisdictional telecommunications utilities for authority to offer services and construct facilities	R. 06-10-006

REPLY COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES

The Division of Ratepayer Advocates (DRA) respectfully submits these reply comments in response to parties' comments regarding the implementation of the California Environmental Quality Act (CEQA) as it pertains to telecommunications utilities. Silence on a particular issue should not be construed as either agreement or disagreement with parties' positions.

I. INTRODUCTION

The record reflects a variety of proposals for streamlining the Commission's CEQA review process. DRA believes that its initial recommendation for a streamlined review process would aid the Commission in its goals to promote deployment of an advanced telecommunications infrastructure and eliminate barriers to competition. Upon review of other parties' suggestions, DRA is also open to modifying its proposal to consider whether there are certain projects for which telecommunications carriers may obtain CEQA review at the local level. DRA opposes, however, applying the G.O. 159-A framework on a blanket basis to all telecommunications carrier projects. Finally, DRA notes that it is not necessary for the Commission to decide at this time whether telecommunications services provisioned over broadband and video facilities are necessarily "incidental."

II. DISCUSSION

A. G.O. 131-D is not an appropriate model for telecommunications CEQA review.

The record reflects DRA's initial analysis that while G.O. 131-D might provide a useful model for telecommunications CEQA review, the GO 131-D framework does not easily apply to telecommunications utilities. Many parties agree with this assessment;[1] AT&T states, for example, that they "do not believe that this model can apply to the telecommunications industry because there is no analogous 'tiering' structure for telecommunications projects," but recommends that the Commission consider adopting a similar strategy for telecommunications utilities.[2] However, two parties warn that telecommunications projects differ vastly from energy utility projects, and any consideration of a multi-tiered approach must take this into consideration.[3] DRA concurs with these assessments that GO 131-D may be a useful model for streamlined levels of review, but conducting different tiers of CEQA review pursuant to transmission levels does not work in the telecommunications context.

B. The application of G.O. 159-A is inappropriate, but delegating some CEQA review to local jurisdictions may be appropriate.

As for whether to apply G.O. 159-A procedures to wireline telecommunications CEQA review, although a number of parties recommend that the GO 159-A process should be extended to wireline carriers,[4] DRA continues to have reservations about such an approach.

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[1] Verizon Comments at 4-5, Level 3 Comments at 6, AT&T Comments at 6, Attorney General (AG) Comments at 7, and League of California Cities, The California State Association of Counties, SCAN/ NATOA, Inc., The City and County of San Francisco and the City of Walnut Creek Comments ("League") at 10.

[2] AT&T Comments at 6.

[3] AG Comments at 7-8; League Comments at 10.

[4] *See, e.g.*, Level 3 Comments at 7, Time Warner Comments at 4, Verizon Comments at 5-6, AT&T Comments at 7-9.

As DRA previously noted, local governments may not be well suited to address the siting and construction of wireline facilities that have cumulative impacts that cut across several localities.[5] The Attorney General expresses similar comments:

> [T]elecommunications projects can span large geographic areas and habitats, transverse several local jurisdictions, and involve a variety of construction techniques that have different levels of impacts. It may be possible to adopt an approach that prescribes procedures according to pre-established criteria, but the criteria must reflect the realities of telephone projects and their potential impacts.[6]

Level 3 argues that under G.O. 159-A, "the local agency discretionary approval process has operated effectively," and that this model is appropriate for other telecommunications carriers because it properly cedes CEQA review to local agencies. Level 3 also argues that G.O. 159-A is consistent with the CEQA Guidelines, and "is the only method that maintains a reasonably level playing field" for competitors.[7] Although it may be true that the application of G.O. 159-A to wireless carriers has been successful thus far, it does not mean that the same standard of CEQA review would be equally successful with, or applicable to, wireline projects. Wireless infrastructure is often less intrusive and obstructive, and should be distinguished from wireline infrastructure.

The League explains that the "regulation of wireless facilities on private property and the regulation of telephone lines within public rights of way" is like "comparing apples and oranges", and that while G.O. 159-A provides for the Commission to overturn local decisions, the Commission has no "authority whatsoever to overturn local decisions relating to the use of public rights-of-way by telephone companies."[8] DRA agrees with these comments.

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[5] DRA Comments at 8.

[6] AG Comments at 7.

[7] Level 3 Comments at 3-4.

[8] League Comments at 11.

For these reasons, DRA believes that the Commission should consider a combination of these proposals.[9] For example, the Commission could defer CEQA review to local jurisdictions for most projects that are *local in nature*, with certain exceptions. In addition, the Commission could retain jurisdiction over any projects that traverse local boundaries. Also, DRA suggests that the Commission perform CEQA review when local jurisdictions decline to conduct CEQA review, or when carriers request Commission involvement. Such an approach where carriers may select local agencies for CEQA review of local projects may help level the playing field while leaving room for exceptions for the Commission to perform CEQA review. DRA recommends that the Commission explore this concept further in the proposed workshops.

C. DRA supports the use of some categorical and statutory exemptions, but sees no need for the creation of new exemptions.

Parties generally support the use of categorical and statutory exemptions. Although most parties did not remark on the application of statutory exemptions, CCTA recommends that the Commission recognize a statutory exemption for emergency repairs. CCTA cites the Natural Resources Code for this exemption,[10] but it appears that CCTA meant to refer to the Public Resources Code.[11] DRA believes that the Commission should incorporate in its streamlined review the use of a statutory exemption for emergency repairs, along with its initial proposed use of the statutory exemption for ministerial projects.

Further, all parties who commented on categorical exemptions believe that at least some are applicable,[12] expressing such sentiments as "most projects undertaken by

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[9] AT&T Comments at 2 and 9; League Comments at 7-9. Other parties made proposals for local review, but DRA believes these two proposals, or a combination thereof, are most valid.

[10] CTA Comments at 2-3.

[11] *See* Public Resources Code Sections 21080(a)(2) and (a)(3).

[12] Verizon Comments at 7-8, Level 3 Comments at 7-8, AT&T Comments at 10, CCTA Comments at 2, Technology Network Comments at 7-8, and League Comments at 12.

telecommunications carriers will be categorically exempt from CEQA"[13] and that the "multiple categorical exemptions contained in the CEQA Guidelines cover the vast majority of telecommunications construction."[14] Because DRA's list of categorical exemptions was comprehensive and included more potential exemptions than any list offered by other parties, DRA recommends that its original list of categorical exemptions be adopted by the Commission.

Moreover, most parties agreed with DRA in recommending that the Commission need not seek the creation of new statutory or categorical exemptions.[15] Level 3 stated that "categorical exemptions are subject to a low threshold for judicial challenges and are not useful for the Commission's purposes" and "[a]lthough a statutory exemption could address how the Commission should apply CEQA, the legislative process is outside of the Commission's control and may take years to enact, or may never come to pass."[16] SureWest likewise recommends against pursuing new categorical exemptions and "believes that pursuing legislation related to CEQA is unlikely to be successful and that the Commission should focus its limited resources and efforts on other areas."[17]

D. DRA's recommendation for a streamlined review process is supported by the Attorney General

DRA proposed in its Opening Comments that the Commission adopt a streamlined review process that will recognize certain categorical exemptions and provide carriers the ability to obtain efficient review of projects that fall within such exemptions.[18] The Attorney General also supports a similar approach. Specifically, the Attorney General states that:

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[13] AT&T Comments at 10.

[14] Verizon Comments at 6.

[15] Verizon Comments at 9, Level 3 Comments at 9, SureWest Comments at 4, AT&T Comments at 11, and League Comments at 12.

[16] Level 3 Comments at 9.

[17] SureWest Comments at 4.

[18] DRA Comments at 10-11.

> As discussed in the OIR, the Commission recently has experimented with a process through which carriers can claim that their projects are categorically exempt and receive a response on an expedited basis. Such a process could be improved by developing standards against which to measure claims that a project is exempt, and, where supported by the record, proposing new categorical exemptions for routine projects where there is no reasonable possibility of significant impacts.[19]

DRA recommends that the Commission use this streamlined review process to the extent that it conducts CEQA review, within a framework in which most review may be done at the local level, as discussed by other parties and outlined above.

E. Program and Master EIRs can be appropriate in the CEQA review process.

In its Opening Comments DRA recommended that the Commission should consider using Program EIRs in situations where non-grandfathered, non-ILEC competitors request construction of new, major telecommunications facilities that involve major trenching, or may involve other significant disruptions to the physical and social environments in which they are proposed to be placed, and that do not fall under categorical or statutory exemptions.[20] The comments reflect that Program and Master EIRs may be appropriate for review of certain projects. The Attorney General voices his general support;[21] and the League favors the use of Program and Project level EIRs for such reviews as part of a cooperative CEQA review process between the Commission and local agencies.[22] Although Verizon and AT&T assert that neither type of EIR would be consistent with streamlining the CEQA process,[23] DRA believes that it is possible to incorporate the Program or Master EIR for cases where the project does not fall into a

[19] AG Comments at 6.

[20] DRA Comments at 13-14.

[21] AG Comments at 6-7.

[22] League Comments at 8-9, 13.

[23] Verizon Comments at 10; AT&T Comments at 11.

categorical or statutory exemption, and that such review may be shared between the Commission and local agencies.

F. The Commission Should Not Decide at this Time Whether Telecommunications Services Provided Over Broadband and Video Facilities are "Incidental" to the Provision of Video and Broadband Services

The record does not provide sufficient evidence for the Commission to conclude that telecommunications services provided over broadband and video services facilities are "incidental" to the provision of broadband/video services. To the extent that parties commented on this issue, many parties in addition to DRA[24] state that they either do not have enough information on this issue, or do not agree with the tentative conclusion.[25] Further, DRA and other parties have raised concerns about the Commission's tentative conclusion that it need not conduct CEQA review of facilities constructed for providing broadband and video services (where telecommunications services are offered over those facilities). DRA believes that the Commission should *not determine* at this time that telecommunications services provided over broadband and video facilities are incidental to the provision of broadband and video services, and also should *not decide* whether it needs to conduct CEQA review for the construction of broadband facilities when those facilities are also used to provide intrastate telecommunications services.

SureWest opposes a Commission determination that the provision of telecommunications is "incidental" to the provision of broadband and video services, as it does not believe that such a determination is accurate, and may end up creating substantial uncertainty for certain carriers.[26] The League states that the provision of telecommunications is not "per se" incidental to the provision of video or broadband services,[27] while the Attorney General observes that "[i]n order to permit parties to

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[24] DRA Comments at 14-16.

[25] SureWest Comments at 5; AG Comments at 12-13, and League Comments at 13-14.

[26] SureWest Comments at 5.

[27] League Comments at 13.

comment meaningfully on this tentative conclusion [regarding whether telecommunications services offered over broadband facilities is incidental], the Commission needs to explain its basis in more detail, with reference to facts in the record."[28] For these reasons, DRA recommends that the Commission decline to adopt any finding or conclusion regarding whether telecommunications services are incidental when offered over broadband or video facilities at this time. The Commission cannot make such a finding until it has developed a record that would support such conclusions, and makes a determination of what constitutes "incidental," a finding that, as DRA describes in Opening Comments, may be somewhat difficult to reach.[29]

DRA also agrees with the Attorney General that it is premature at this time for the Commission to decide not to issue discretionary decisions (*i.e.*, conduct CEQA review) regarding broadband facilities where the facilities are also used to provide intrastate telecommunications services. The Attorney General points out that one effect of the proposed conclusion could be "a competitive advantage for companies that offer telephone, internet, and video services over a single network," compared to non-video service competitors.[30] At the same time, DRA recognizes that the Commission's role with regard to broadband facilities could promote or hamper competitive carriers from developing bundled offerings.

Given that local agencies have authority over construction of facilities offering broadband and video services per AB 2987, DRA agrees with the League that the Commission and local agencies should work together to carry out their respective and overlapping roles in this area. To the extent that the Commission considers revising its current regulatory framework to allow carriers the option of local review over certain projects (as DRA discussed above), this issue is potentially moot, as local agencies may

[28] AG Comments at 12.

[29] DRA Comments at 15.

[30] AG Comments at 13.

review construction of these facilities.[31] Accordingly, DRA does not believe that the Commission needs to make a specific determination here as to whether it should retain CEQA review over the construction of broadband and video facilities that are also used to provide telecommunications services. Instead, DRA believes that questions surrounding this issue should be resolved through the Commission's general modifications in this rulemaking to its existing CEQA review of telecommunications projects.

III. CONCLUSION

For the reasons stated above, DRA recommends that the Commission adopt the categorical and statutory exemptions previously discussed, consider approving a streamlined approval process for CEQA requirements, and further review the delegation of limited responsibility for CEQA review to the local level. The provision of telecommunications services over video and broadband facilities should not be determined to be "incidental" to the provision of video and broadband services.

Respectfully submitted,

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[31] To the extent that the Commission decides to exercise its discretionary authority over broadband facilities that offer telecommunications services, it may need to develop guidelines for when Commission review/approval is necessary.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **'REPLY COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES**" in **R.06-10-006** by using the following service:

[X] **E-Mail Service:** sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

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Executed on November 21, 2006 at San Francisco, California.

/s/ HALINA MARCINKOWSKi

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